

BEFORE THE
SPECIAL EDUCATION DIVISION
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MANTECA UNIFIED SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH No. N2005110521

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, State of California Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on June 1, 2006, in Manteca, California.

Effective May 3, 2006, Petitioner Manteca Unified School District (Manteca USD, or District) filed an amended request for a due process hearing (complaint)¹ regarding Respondent (Student), pursuant to the Order on Motion to Amend Due Process Complaint of the same date issued by ALJ Keith J. Kirchubel.

District was represented at hearing by Janice Callanan, Manteca USD Director of Special Education. No appearance was made by or on behalf of Student or her Parents (Parents, Mother, or Father), and neither Student nor her Parents were present or testified.

Witness testimony and documentary evidence were received. District made oral closing argument, the record was closed, and the matter was submitted on June 1, 2006.

¹ A request for a due process hearing under California Education Code section 56502 is the due process complaint notice required under 20 United States Code (U.S.C.) section 1415(b)(7)(A).

ISSUE

Does District have the right to assess Student pursuant to a triennial assessment plan, despite her Parents' lack of consent?

FACTUAL FINDINGS

Service

1. On April 20, 2006, District served a copy of the amended complaint on Parents at their address of record with the District. The amended complaint was deemed filed on May 3, 2006.

2. On May 4, 2006, OAHSED served a Notice of Due Process Hearing and Mediation on both the District and Parents at their respective addresses of record, setting the due process hearing herein for June 1, 2006, at 9:30 a.m., to be held in the offices of Manteca USD, located at 2901 E. Louise Avenue, Manteca, CA 95336.

3. Shortly after 9:00 a.m. on June 1, 2006, and just prior to the start of the hearing herein, Tracey Jakubowski, a Program Specialist with District's Special Education division, called Parents. She called Mother at Mother's cell phone number, known to the District as an emergency contact number, and left a message. She then called Father at Father's known cell phone number. Father answered the telephone. Ms. Jakubowski asked him if Student and/or Parents intended to appear at the hearing scheduled to begin at 9:30 a.m. Father informed her that Student and Parents did not intend to appear.

4. At 9:35 a.m. on June 1, 2006, the hearing in this matter commenced and continued until 11:00 a.m., when the record was closed.

Eligibility and Disability

5. Student recently turned nine years old, and lives with her family within the boundaries of the District. She attends third grade at New Haven Elementary School (New Haven) in the District. Student first became eligible for special education and related services in May of 2003, qualifying as Speech or Language Impaired. At that time, District conducted a speech and language assessment in English, Student's language.

6. Student's initial May 2003 individualized education program (IEP) determined that Student had deficiencies in the area of language, that impeded her education. Parents attended the IEP meeting and consented to the IEP. Student primarily had problems answering "Wh" questions (Who, What, When, Where, or Why), and had trouble with verbal problem solving skills. While her fluency was within the average range, she had difficulty labeling objects or completing sentences, had poor eye contact, and did not appear to interact with other pupils, her peers, on a consistent basis. The IEP team agreed to place Student in a

general education classroom daily for academics, and to provide her with a small group pull-out setting for language therapy sessions, for twenty-five minutes once a week.

7. Student's last agreed-upon IEP was on May 5, 2005. Student and her Parents attended the May 2005 annual review meeting at New Haven. Cynthia Vasconcellos Knauss (Ms. Knauss), District's Language, Speech, and Hearing Specialist who has worked with Student since 2003, reviewed the annual speech and language assessment summary with the IEP team. Student's teacher assessed her then-present levels of functioning for accessing core curriculum. Student's progress toward her annual goals was evaluated. Student had achieved her goal of improving the use of appropriate eye contact when answering a question, and was able to answer "Why" and "Who" questions six out of ten times over two consecutive sessions. Student continued to have difficulty with problem solving skills (pragmatics), and still did not appear to have much peer interaction. New goals were written for expressive language and pragmatics, and the May 2005 IEP again offered Student weekly twenty-five minute language and speech services in a small group pull-out session. Parents consented to the May 2005 IEP.

Parents' Request to Terminate Special Education Services

8. On September 20, 2005, Mother went to New Haven, spoke with Student's speech therapist, Ms. Knauss, and requested Student's immediate "dismissal" from special education services. Ms. Knauss explained to Mother that the law does not permit the District to drop or "exit" a pupil from special education services without a new assessment to determine whether the pupil is still eligible, or no longer qualifies. Father spoke to Ms. Knauss by telephone, as well, and was "adamant" that services cease. Parents believed Student no longer needed any speech or language services. Parents also spoke to Student's classroom teacher and the Director of Special Education. District offered to "move up" Student's triennial assessment date of May 2006, and to do that assessment in the fall of 2005, to investigate Parents' contention.

District's Proposed Triennial Assessment Plan

9. On September 20, 2005, District mailed to Parents at their address of record a cover letter and a proposed assessment plan of the same date. A notice of parental rights and procedural safeguards was also sent. The proposed individual assessment plan proposed to assess Student in the areas of: (1) Language, Speech, and Communication Development by a Language, Speech and Hearing Specialist; and (2) Health Development.²

10. District's September 2005 request to assess Student was based on District's desire to cooperate with Parents to assess whether Student remained eligible for special education services or not. It was a triennial assessment plan in advance of Student's triennial assessment due in the Spring of 2006. Parents returned the assessment plan form to District, executed by Father on September 21, 2005. Father indicated that he understood the plan and

² Ms. Knauss testified that she would have been the assessor for both areas of development.

his parental rights, and checked the box stating: “No, I do not give my permission for this assessment.” Someone printed “Why?” in a comment box.

11. On April 7, 2006, District again notified Parents in writing of their proposal to conduct Student’s triennial assessment, an assessment required by law to be completed every three years for all children with disabilities receiving special education and related services. Accordingly, District mailed to Parents, at their address of record, a cover letter and a proposed assessment plan of the same date. A second notice of parental rights and procedural safeguards was also included. Identical to the September 2005 proposal, the individual assessment plan proposes to assess Student in the area of Language, Speech, and Communication Development by a Language, Speech and Hearing Specialist. The plan indicates that tests and observations would measure Student’s ability to “understand, relate to and use language and speech clearly and appropriately.” It indicates that the tests “may also measure auditory perceptual skills.” The plan also proposes to assess Student in the area of Health Development. It indicates that tests and observations would measure vision, low vision, hearing, health, developmental history and medical history, as well as a review of medical records.

12. For the triennial assessment, District’s speech therapist would review Student’s prior tests and goals, use standardized tests, and select tests in English that are appropriate for Student’s chronological and developmental age. The tests would include the Test of Language Development, Primary (TOLD-P:3, up to age eight), or the Test of Language Development, Intermediate (TOLD-I:3, from age eight to thirteen); the Test of Problem Solving, which looks at answering “Wh” questions, and the Test of General Pragmatic Skills, which is observational. Depending on how Student does on the generalized language tests, Ms. Knauss would also seek to evaluate Student’s vocabulary, and use The Test of Semantic Skills, and/or a sentence structure test. She would also do an articulation screening if appropriate. Ms. Knauss has a Master of Arts degree in speech pathology, is certified by the American Speech, Language and Hearing Association,³ and is licensed by the State of California as a speech and language therapist. District is not aware of any other suspected areas of disability, and the health review is precautionary

13. At no time since on or about September 20, 2005, has Student received special education related services in speech and language from District, even though District has continued to offer such services under the May 2005 IEP. Student has declined to accept such services, and has attended her general education classroom only.

14. Student’s general education teacher, Peggy Dianne Danel, described Student’s language problems in her classroom, from August of 2005 to the week before the hearing. Those problems remain consistent with the May 2005 IEP’s description of her problems. While Student loves math and is quick to recite answers to math problems, she still struggles with verbal problem solving, such as the “Wh” questions, and will generally give up, put her

³ ASHA is a national professional, scientific, and credentialing association for over one hundred thousand professionals who are speech-language pathologists, audiologists, and speech, language, and hearing scientists.

head down, or say “I don’t know,” even when the teacher believes Student does know the answer. In contrast, Student does not display this level of verbal frustration when engaged in playing or sharing information about a preferred topic, such as cats. The teacher has not seen any change in Student’s struggles since August of 2005.

15. District is not sure Parents understand the nature of Student’s disability because neither Mother nor Father has observed Student’s academic performance and related problems in the classroom. Parents have not made Student available to the District for any evaluation or assessment since the May 2005 IEP.

LEGAL CONCLUSIONS

Applicable Law

1. District, as the Petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) __ U.S. __ [126 S. Ct. 528, 163 L. Ed.2d 387].)

2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Act (IDEA 2004). (20 U.S.C. 1412(a)(1)(A).) Special education is defined in pertinent part as specially designated instruction, at no cost to parents, to meet the unique needs of the child. (20 U.S.C. § 1401(29); Ed. Code § 56031.) Before any action is taken with respect to the initial placement of an child with special needs, an assessment of the pupil’s educational needs shall be conducted. (California Education Code [Ed. Code] § 56320.) Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall be conducted if the LEA determines “that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment.” (20 U.S.C. § 1414(a)(2)(A); Ed. Code § 56381, subd. (a).) Education Code section 56381, subdivision (a) also provides that the LEA shall conduct a reassessment if the pupil’s parent or teacher requests a new assessment. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (e), (f).)

3. The reassessment plan must be accompanied by a notice of the parent’s rights and a written explanation of the procedural safeguards under IDEA and California law. (Ed. Code § 56321, subd. (a).) The parent has at least fifteen days from the receipt of the proposed assessment plan to arrive at a decision. (Ed Code § 56321, subd. (c).)

4. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S. C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (a), (b).) Assessments must be conducted by

individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code §§ 56320, subd. (g), 56322.)

5. An LEA is required to reassess a student to evaluate his or her eligibility for special education and related services before determining that the child is no longer a child with a disability, and terminating special education services. (20 U.S.C. § 1414(c)(5); Ed. Code § 56381, subd. (h).)

6. While the law provides that an LEA has the right and obligation to conduct assessments, parental consent is required before a school district may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code § 56321, subd. (c).) An LEA can override a lack of parental consent if the LEA establishes at a due process hearing that assessment is needed. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code §§ 56321, 56329, subd. (c), 56506, subd. (e).) The LEA must demonstrate at hearing that it has taken reasonable measures to obtain the consent of the parent, and that the child’s parent has failed to respond. (Ed. Code §§ 56381, subd. (f), 56506, subd. (e).)

Determination of Issues

7. Pursuant to Factual Findings 8, 9, and 10, District provided adequate legal notice to Parents of the September 2005 assessment plan. Parents requested Student’s immediate exit from special education on September 20, 2005. Thereafter, Parents received District’s notice and September 2005 assessment plan, returned the plan to the District, and expressly refused in writing to consent to it. Competent evidence was presented that three District personnel spoke with Parents by telephone in September, and explained that District could not exit Student from special education services without complying with the law to reassess Student.

8. As found in Factual Findings 7, 9, and 10, District’s proposed assessment plan of September 20, 2005, would have occurred within one year of Student’s annual, observational assessment of May 2005, in connection with the May 2005 IEP. District could have reassessed Student in the fall of 2005, with the consent of Parents. The assessment law provides that the parties could have agreed to more than one assessment within a year, but Parents did not agree. Parents did not request an assessment, but an exit from services. Pursuant to Factual Findings 7, 8, 10, and 14, District did not establish that it had any independent basis to determine that reassessment in the fall of 2005 was warranted, because it knew of no change in Student’s needs, other than Parents’ request to cease services.

9. Pursuant to Factual Findings 6, 10, 11, 12, and 14, District’s proposed assessment plan dated April 7, 2006, occurred in the context of Student’s mandatory triennial assessment, which was due by May 13, 2006. District determined that Student needs reassessment because the law requires it, and this would be her first triennial assessment since becoming eligible in 2003. District has no objective information that Student no longer

qualifies for special education services, but even if it did have such information, District is required to reassess Student to make that determination.

10. As found in Factual Findings 7, 11, 12, and 14, District provided adequate legal notice to Parents of the April 2006 triennial assessment plan. District sent the notice letter and the proposed assessment plan on April 7, 2006, to Parents at their same address of record with the District, along with notice of parental rights and procedural safeguards. District's planned assessments would be conducted by a trained and qualified speech and language therapist, Ms. Knauss. Under Education Code section 56321, Parents had fifteen days within which to respond to the plan, or until April 22, 2006. Since that was a Saturday, Parents could have timely responded by Monday, April 24, 2006.⁴ On April 20, 2006, District's proposed amended complaint, which added the issue of the 2006 triennial assessment plan to its earlier complaint, was served on Parents and OAHSED. OAHSED did not grant the motion to amend until May 3, 2006. During the interval, Parents could still have responded to the proposed plan (or filed an objection to the proposed due process amendment), and did not do so. There is no evidence that Parents were prejudiced by the four-day overlap between the assessment timeline and the serving of the due process notice. District has taken reasonable measures to obtain Parents' consent to the plan. Since the April 2006 proposed assessment plan otherwise meets the legal requirements, it is upheld. District has the right to assess Student based on the triennial assessment plan in the absence of parental consent.

ORDER

1. District may conduct reassessments of Student pursuant to the proposed triennial assessment plan of April 7, 2006.

2. The Parents of Student shall make her reasonably available for the reassessments.

PREVAILING PARTY

District prevailed on the only issue for hearing in this case. (Ed. Code § 56507, subd. (d).)

⁴ See Code of Civil Procedure section 12a.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. Or, a party may bring a civil action in United States District Court. (Ed. Code § 56505, subd. (k).)

DATED: June 9, 2006

A handwritten signature in black ink, appearing to read "Deidre L. Johnson", is written over a horizontal line.

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division